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Nos. 90-1721, 90-1725, 90-1760 and 90-1949

In the Supreme Court of the United States

OCTOBER TERM, 1991

NEW YORK CITY PUBLIC UTILITY SERVICE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

VERMONT DEPARTMENT OF PUBLIC SERVICE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

[Caption Continued on Inside Cover]

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, ET AL., PETITIONERS

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, ET AL.

QUESTIONS PRESENTED

The Niagara Redevelopment Act (NRA), 16 U.S.C. 836-836a, gives "public bodies" a preference in receiving low-cost hydroelectric power from the Niagara Power Project. The questions presented are:

(1) Whether the criteria developed by the Federal Energy Regulatory Commission (the Commission) to identify "public bodies" under the NRA represent a permissible interpretation of the statute.

(2) Whether substantial evidence supported the Commission's conclusion that petitioners are not "public bodies" under the NRA.

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In the Supreme Court of the United States

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FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 922 F.2d 73. The opinion of the Federal Energy Regulatory Commission (Pet. App. 64-109) is reported at 48 F.E.R.C. ¶ 61,124. The Commission's order denying rehearing (Pet. App. 110-114) is reported at 49 F.E.R.C. ¶ 61,069.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1990. A petition for rehearing was denied on February 12, 1991. The petitions for a writ of certiorari in Nos. 90-1721 and 90-1725 were filed on May 9, 1991. The petition for a writ of certiorari in No. 90-1760 was filed on May 13, 1991. The petition for a writ of certiorari in No. 90-1949 was filed on June 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Niagara Redevelopment Act of 1957 (NRA) (also popularly known as the Niagara Power Project Act), 16 U.S.C. 836-836a, authorized the Federal Power Commission (FPC) to grant a license to the Power Authority of the State of New York (PASNY) to construct and operate a hydroelectric power project on the Niagara River. The NRA directed the FPC in issuing the license to PASNY to impose certain conditions "in addition to those deemed necessary and required under * * * the Federal Power Act [16 U.S.C. 791a et seq.]." 16 U.S.C. 836(b). The conditions prescribed in the NRA required PASNY "in disposing of 50 per centum of the project power [to] give preference and priority to public bodies and nonprofit cooperatives within economic transmission dis-

tance." 16 U.S.C. 836(b)(1). PASNY was also required to make a "reasonable portion" (not to exceed 20%) of that 50%—*i.e.*, up to 10% of power from the Niagara Project—available for use in neighboring States. 16 U.S.C. 836(b)(2).

The FPC issued a license to PASNY for the Niagara Project in 1958, including in the license *verbatim* the conditions prescribed in the NRA. *Power Authority of New York*, 18 F.P.C. 344 (1957); see *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 106 (1960). Beginning in 1978, various customers of preference power from the Niagara Project filed a series of complaints against PASNY with the FPC's successor, the Federal Energy Regulatory Commission (the Commission). The complaints concerned PASNY's allocation of Niagara Project power among preference and non-preference customers.

In 1978, a complaint against PASNY was filed by the Municipal Electric Utilities Association (MEUA), the representative of the municipal utilities in New York that received preference power. The Commission held that PASNY had violated the NRA and its license by making long-term contracts with private utilities for Niagara Project power without adequately considering the projected needs of preference customers. See *Power Authority of New York* v. *FERC*, 743 F.2d 93, 97 (2d Cir. 1984) [hereinafter *PASNY*].

The Second Circuit affirmed the Commission's holding. In rejecting challenges to the Commission's decision, the court discussed "the nature of the preference created by the [NRA]." *PASNY*, 743 F.2d at 103. The court determined that the purpose of the preference was to promote "yardstick competition" between publicly owned utilities and privately owned utilities. *Id.* at 98-100, 104-105. The prin-

ciple of "yardstick competition" was premised on a "basic determination" by Congress that "if [public bodies] * * * are supplied with cheap hydropower their lower competitive rates will force the private utilities in turn to reduce their rates, with resulting benefits to all." *Id.* at 105.

In 1980, another complaint against PASNY was filed by the associations representing preference customers in Connecticut and Massachusetts: the Connecticut Municipal Electric Energy Cooperative (CMEEC) and the Massachusetts Municipal Wholesale Electric Company (MMWEC). In the ensuing proceeding, the Commission held that PASNY had improperly sold preference power to two entities—New York's Metropolitan Transit Authority (MTA) and the Vermont Department of Public Service (VDPS)—that were not "public bodies" within the meaning of the NRA. The Commission based its holding on its determination that neither MTA, which used all of the preference power itself, nor VDPS, which resold the preference power to private utilities, provided "yardstick competition" with private utilities. The Commission concluded that, in light of Congress's purpose to promote such competition, Congress intended the term "public bodies" to mean "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." [1]

The Second Circuit upheld the Commission's definition of "public bodies" under the NRA. *Metropolitan Transp. Auth.* v. *FERC*, 796 F.2d 584 (1986), cert.

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[1] *Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York*, 30 F.E.R.C. ¶ 61,323, at 61,651 (1985); see also *Opinion 229-A; Opinion & Order on Rehearing*, 32 F.E.R.C. ¶ 61,194 (1985).

denied, 479 U.S. 1085 (1987) [hereinafter *MTA*]. The court stated that, although the Commission's definition of "public bodies" was not compelled by the text of the statute, "the legislative history of the NRA demonstrates that [the Commission's definition] is what Congress intended the term to mean." *Id.* at 591. The court reiterated that "Congress' crystal clear intent" was to foster "yardstick competition" between public bodies and private utilities. *Id.* at 593. It agreed with the Commission that Congress believed such competition would occur only if the public entities that received preference power "distributed that power to consumers." *Id.* at 592. The court concluded that "it was implicit throughout the debates that 'public bodies' were publicly-owned entities capable of distributing the preference power they received." *Ibid.*

2. This case began in February 1986, when MEUA filed a complaint with the Commission charging that PASNY was again allocating preference power from the Niagara Project to entities that were not "public bodies" within the meaning of the NRA. MEUA's complaint concerned PASNY's allocations to municipal distribution agencies (MDAs) in New York. The MDAs had arranged to distribute preference power to retail customers by leasing the facilities of private utilities. Additional complaints were filed by MMWEC and CMEEC concerning PASNY's allocation of preference power to VDPS. After a change in state law prompted by the *MTA* proceeding, VDPS had entered into lease agreements with private utilities similar to those entered into by the MDAs. See Vt. Stat. Ann. tit. 30, § 212a (1986). In a consolidated proceeding, the ALJ determined that neither VDPS nor the MDAs were entitled to preference power because they are

not "public bodies" under the NRA. Pet. App. 26-27, 54-63. The Commission adopted the ALJ's decision. *Id.* at 89-101.

a. In accordance with the Commission's pre-hearing order, the ALJ formulated three criteria for identifying "public bodies" under the NRA.[2] He then found that neither VDPS nor the MDAs satisfied any of these criteria.

First, the ALJ stated, "[a]n NRA public body must provide yardstick competition." Pet. App. 40. This requirement, he noted, had been identified in *MTA* as Congress's purpose for creating the "public bodies" preference. *Ibid.* (quoting *MTA*, 796 F.2d at 593). To provide yardstick competition, the ALJ determined, a public body must pose "a threat of takeover or displacement to the investor owned utilities." *Id.* at 40-41. It must also provide "a meaningful opportunity for consumers and regulators to compare the rates and quality of service of the public utility with that of investor owned utilities." Pet. App. 41. Finally, it must "substantially meet the energy needs of its customers." *Ibid.*

In addition to providing yardstick competition, the ALJ determined, "[a]n NRA public body must be

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[2] The Commission's order posed three issues for determination:

> (1) How may governmental entities which lease distribution facilities from investor-owned utilities qualify as NRA "public bodies?"
>
> (2) Does an NRA "public body" need to compete with investor-owned utilities for customers in order to perform a yardstick competition function?
>
> (3) What other responsibilities, if any, must a governmental entity assume to qualify as a "public body" under the NRA?

Pet. App. 27-28.

directly responsible to retail consumers for the electric energy sold and delivered to them." Pet. App. 41. This second requirement, the ALJ observed, had previously been adopted by the Commission and upheld by the Second Circuit in *MTA*. The Commission had held that VDPS could not qualify as a public body merely by reselling preference power to private utilities because, "[a]lthough VDPS did arrange for distribution services [through resale], [it was not] the party *directly responsible* for the needs of the consumers served." *Ibid.* (quoting *Opinion 229-A*, 32 F.E.R.C. at 61,444 (emphasis supplied by ALJ)).

Finally, the ALJ found, "[a]n NRA public body must have control over the distribution system." Pet. App. 42. The ALJ derived this requirement from the Commission's prior conclusion that "only publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail are public bodies under the NRA." *Id.* at 43 (quoting *Opinion 229*, 30 F.E.R.C. at 61,651). The ALJ determined that "[t]o be capable of 'distributing power directly' means to have control of the distribution system so as not to have to rely on, or be constrained by anyone else, and to have a direct seller-customer relationship with each customer." *Ibid.*

Applying these criteria to the MDAs, the ALJ found that MDAs are not public bodies because, under their lease arrangements with private utilities, the private utilities retain control over distributing preference power to retail customers. Pet. App. 54-57. Under the leases, the private utilities reserved exclusive control over the leased facilities and remained exclusively responsible for supplying the needs of retail customers and ensuring continuity of service. *Id.* at 54. The private utilities also reserved the right to suspend or terminate the leases under a variety of

circumstances that prevented the MDAs from exercising "independence of action" in improving rates and quality of service. *Id.* at 55. Moreover, the bills sent to retail customers did not allow any comparison between the private utilities' service and that available from the MDAs. *Id.* at 55-56.

Based on "virtually identical" (Pet. App. 58) leases between VDPS and private utilities in Vermont, the ALJ also concluded that VDPS is not a "public bod[y]." *Id.* at 57-61. The ALJ found that VDPS satisfied only one of the elements of providing yardstick competition; it "suppl[ied] a substantial percentage of Vermont's residents' needs for electricity." *Id.* at 60. VDPS did not, however, furnish retail customers with a basis for comparing the cost or quality of service. *Ibid.* Nor did VDPS have direct responsibility to retail customers for the service provided. Instead, the private utilities reserved exclusive control over distribution and retained full responsibility for providing service. *Id.* at 60-61. The terms of VDPS's leases "le[ft] no room for control by VDPS." *Id.* at 61.

b. The Commission adopted the ALJ's decision. Pet. App. 64-109. The Commission held that the three elements of yardstick competition articulated by the ALJ were "appropriate": "If these elements are absent the customer does not have a real choice among competitors." *Id.* at 88. The Commission also upheld the other two criteria for "public bodies" identified by the ALJ. *Id.* at 79-83, 86-89.[3] Finally, the

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[3] The Commission agreed with the ALJ that public entities do not have to own the system for distributing preference power to satisfy the second criterion—direct responsibility to consumers for distribution of power; instead, the requisite control can be achieved through proper leasing arrangements. Pet. App. 88. The Commission similarly sustained the ALJ's

Commission sustained the ALJ's conclusion that neither VDPS nor the MDAs are "public bodies" under the NRA. *Id.* at 89-101.

3. The court of appeals affirmed. Pet. App. 1-24. The court initially determined that the Commission's interpretation of the NRA and of PASNY's license should be reviewed under the two-part analysis set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that the Commission's factual findings should be upheld if supported by substantial evidence. Pet. App. 12-13.

The court upheld the Commission's criteria for identifying "public bodies" for purposes of the NRA. Pet. App. 13-17. The court observed that "the term 'public body' is not defined in the NRA." *Id.* at 14. The court determined that, in giving content to that term, the Commission properly elaborated upon its prior conclusion that "in order to qualify as a 'public body' an entity must actually deliver its energy to retail customers." *Id.* at 15. The Commission's interpretation, the court held, appropriately "strikes a delicate balance":

> While not requiring public entities directly to own distribution facilities, the test does require such entities to have active management control over the distribution of preference power. Absent such a requirement, the competitive role that we deem essential for "public body" status could not be achieved.

Id. at 17.

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conclusion that the third criterion can be satisfied if a public body meets "substantially" all of its retail customers' needs, thereby affording public entities a measure of "flexibility." *Id.* at 88-89.

The court further held that substantial evidence supported the Commission's conclusion that neither VDPS nor the MDAs are "public bodies." Pet. App. 17-23. The court observed that the findings on which that conclusion was based "encompass all of the specific points" that petitioners contended had not been considered. *Id.* at 18. In making those findings, the court held, the Commission properly relied on the terms of petitioners' lease agreements with the private utilities that distributed the preference power. *Id.* at 19. The court agreed with the Commission that, under the leases entered into by the MDAs, "all responsibility for [distribution] operations rested with the IOU [*i.e.*, investor-owned utility]." *Ibid.* The court similarly determined that under its leases VDPS "ha[d] no responsibility for the maintenance, construction, or operation of the distribution facilities" (*id.* at 20-21) and was "essentially * * * precluded from competing with the IOUs on a cost basis" (*id.* at 21). "If spurring competition is the objective of the NRA," the court concluded, "it is difficult for us to see how the leasing arrangements at issue advance that fundamental objective." *Ibid.*

ARGUMENT

The court of appeals properly applied *Chevron*, *supra*, to review the Commission's criteria for identifying "public bodies" under the NRA and correctly concluded that those criteria represent a permissible interpretation of a statute of limited geographic scope. The court was also correct in affirming the Commission's conclusion that petitioners are not "public bodies" for purposes of the NRA. Further review is therefore not warranted.

1. Petitioners contend that the court of appeals improperly relied on *Chevron*, *supra*, in reviewing the

Commission's interpretation of the NRA. They argue that (1) the Commission's interpretation does not reflect the exercise of independent judgment; (2) PASNY's interpretation rather than the Commission's is entitled to deference from a reviewing court; and (3) the Commission's interpretation violates the plain language and intent of the NRA. These arguments do not withstand analysis.

a. Petitioners VDPS and New York City Public Utility Service (NYCPUS) contend (VDPS Pet. 12-15; NYCPUS Pet. 12-14) that the Commission "never exercised its discretion" (VDPS Pet. 12) in this case. Instead, they assert, the Commission considered its decision to be "mandated" by the court of appeals' decision in *MTA*. VDPS Pet. 12-13; NYCPUS Pet. 12-13. That assertion is incorrect.

As the court of appeals stated, the proceedings in this case reflected the Commission's "attempt to clarify further the requisite characteristics of a 'public body.'" Pet. App. 15. At the outset of the proceeding, the Commission issued an order directing the ALJ to "develop criteria for determining when an entity that does not own a distribution system may qualify as a public body." *Id.* at 83 n.36; see note 2, *supra*. Pursuant to the order, the ALJ received extensive evidence and briefing aimed at formulating a set of criteria based on statutory sources and on Commission and court precedent. See Pet. App. 28-44. The criteria ultimately adopted by the ALJ "expand[ed] on concepts * * * initially articulated in *PASNY* and *MTA*." *Id.* at 16.

The Commission correctly viewed the ALJ's criteria as the product of discretionary decision making, and it adopted them because they accorded with the purpose of the NRA and with precedent. The Commission upheld the criterion requiring that a public

body control the distribution system as "a logical interpretation of the precedent." Pet. App. 83 n.36. It held that the requirements for yardstick competition were an "appropriate" way of furthering the purpose of the NRA. *Id.* at 88. Similarly, it upheld the requirement that a public body meet substantially all of its customers' needs as permitting needed "flexibility." *Ibid.*

b. The court of appeals correctly held that the Commission's criteria for identifying "public bodies" deserve "great deference." Pet. App. 12. Congress entrusted the Commission with the responsibility to ensure that PASNY complies with the license for the Niagara Project. The Commission's authority derives from both the NRA and the Federal Power Act. 16 U.S.C. 836(a); see *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 115-124 (1960) (Federal Power Commission had authority under the FPA, 16 U.S.C. 814, to condemn property for Niagara Project). The Commission developed its criteria in the course of determining whether PASNY had complied with its license. The criteria thus represent "an executive department's construction of a statutory scheme it is entrusted to administer," and as such are entitled to "considerable weight." *Chevron*, 467 U.S. at 844.

In contending that PASNY's interpretation of the NRA, not the Commission's, is entitled to deference, petitioner VDPS relies (VDPS Pet. 10, 16) on this Court's decision in *Martin* v. *Occupational Safety & Health Review Comm'n*, 111 S. Ct. 1171 (1991). As petitioner concedes (Pet. 16), however, there are "obvious[]" differences between this case and *Martin*. *Martin* concerned the "unusual regulatory structure" (111 S. Ct. at 1176) of split federal enforcement created in the Occupational Safety and Health Act of

1970. In contrast, under the NRA and the FPA, the Commission is the only agency responsible for enforcing PASNY's compliance with the license for the Niagara Project. Pet. App. 12-13; see *Opinion 229-A*, 32 F.E.R.C. at 61,451 n.12; see also *PASNY*, 743 F.2d at 108 (labelling "doubtful" PASNY's argument that it was entitled to more deference than other licensees of the Commission). For present purposes, PASNY's role is more that of regulatee rather than regulator, and it is the Commission in which Congress has reposed responsibility to enforce the legislative will. Furthermore, because the Commission's responsibilities under the FPA extend to federal power projects across the nation, it clearly has greater expertise than PASNY to decide issues concerning the allocation of power. For all these reasons, the logical conclusion is that Congress intended to invest the Commission, not PASNY, with discretion in interpreting the NRA. Cf. *Martin*, 111 S. Ct. at 1176-1177.

c. Likewise without merit is petitioners' contention that the Commission's "public bodies" criteria violate the plain language and intent of the NRA. At the outset, petitioners are mistaken in relying on "plain language" arguments. See VDPS Pet. 17-22; COWPUSA Pet. 12-24. As the court of appeals observed, "the term 'public body' is not defined in the NRA." Pet. App. 14. The court properly reviewed the Commission's criteria to determine whether they are "based on a permissible construction of the [NRA]." *Ibid.* (quoting *Chevron*, 467 U.S. at 843).

In upholding the Commission's criteria as "consistent with the history and purposes of the NRA" (Pet. App. 24), the court of appeals was guided by its prior decisions in *PASNY* and *MTA*. *Id.* at 6-8,

14-17. The court in those cases had held that Congress's "crystal clear intent" in the NRA was to promote "yardstick competition" between publicly owned and privately owned utilities. *MTA*, 796 F.2d at 593; see also *PASNY*, 743 F.2d at 104-107. The court here determined that the Commission's criteria were resonable means of promoting "yardstick competition":

> The Commission's "public body" test strikes a delicate balance. While not requiring public entities directly to own distribution facilities, the test does require such entities to have active management control over the distribution of preference power. Absent such a requirement, the competitive role that we deem essential for "public body" status could not be achieved.

Pet. App. 17.

Petitioners NYCPUS and VDPS concede that the purpose of the "public bodies" preference is to provide "yardstick competition"; they contend, however, that the Commission's criteria go beyond what Congress considered necessary to ensure such competition. NYCPUS Pet. 11-12; VDPS Pet. 20-21.[4] Spe-

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[4] Petitioner COWPUSA takes a different tack, arguing that " 'yardstick competition' is a nonsensical economic doctrine which is neither expressly nor implicitly part of the intent or purpose of the NRA" (COWPUSA Pet. 10-11), and that the principle of "yardstick competition" violates the Tenth Amendment because it infringes on the authority of States to apply state law in allocating preference power from the Niagara Project (*id.* at 29-34). In *PASNY* and *MTA*, the Second Circuit considered all of the arguments that COWPUSA raises here and correctly rejected them. See *PASNY*, 743 F.2d at 106 (NRA preempts conflicting state law regarding allocation of preference power from Niagara Project); see also *id.* at 104-106 (discussing "yardstick competition"); *MTA*, 796 F.2d at 591-593 (same). And in *MTA* this Court denied certiorari. 479 U.S. 1085 (1987).

cifically, they assert that (1) Congress intended public bodies to compete only in the supply, not in the distribution, of preference power; and (2) Congress intended only regulators, not consumers, to compare the service offered by private utilities to that offered by public utilities. NYCPUS Pet. 11; VDPS Pet. 20. Based on these assertions, petitioners argue that the Commission's criteria violate Congress's intent by requiring that public bodies control the system for distributing preference power and that consumers be able to compare the cost and quality of service.

The chief difficulty with petitioners' argument is that nothing in the text or history of the NRA supports petitioners' particularized view of congressional intent. Petitioners base their argument exclusively on one sentence in the *MTA* opinion:

> The municipal utilities, Congress hoped, would act as yardsticks by using their supply of hydropower to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return.

796 F.2d at 592, quoted at NYCPUS Pet. 11 and VDPS Pet. 20. Petitioners obviously err in treating the court's statement as if it were statutory text. Moreover, petitioners misread the court's statement. Indeed, the court in *MTA* rejected the argument renewed here that control over distribution was irrelevant to a public entity's status as a "public bod[y]." *MTA*, 796 F.2d at 593 ("public bodies" must be "capable of selling *and distributing* power directly to consumers of electricity at retail") (emphasis added).[5] Moreover, the court in *MTA* never sug-

[5] See also *MTA*, 796 F.2d at 592 ("[I]t was implicit throughout the debates that 'public bodies' were publicly-owned en-

gested that Congress intended only regulators, not consumers, to be able to compare the service provided by private utilities to that provided by "public bodies." It is therefore not surprising that the court in this case saw no inconsistency between the Commission's criteria and the court's prior decision in *MTA*.

At bottom, petitioners' challenge to the Commission's criteria is based on their view that the Commission could have developed a less restrictive definition of "public bodies." [6] Even if that is so, it provides no basis for setting aside the Commission's decision. A reviewing court "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction." *Chevron*, 467 U.S. at 843 n.11. The Commission's criteria for identifying "public bodies" are fully consistent with the language and intent of the NRA and were therefore properly upheld by the court of appeals.[7]

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tities capable of distributing the preference power they received.").

[6] Petitioners NYCPUS and VDPS cite *Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988), and *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983), in arguing that competition in a regulated industry can be achieved without requiring "yardstick competition." NYCPUS Pet. 9-10; VDPS Pet. 27-28. These decisions are inapposite, and petitioners' arguments beside the point, in light of Congress's purpose in the NRA to encourage yardstick competition, not simply competition of any sort. The Commission properly rejected such arguments, observing that the Second Circuit had previously refused to "second-guess [Congress's] basic determination." Pet. App. 84-85 (quoting *PASNY*, 743 F.2d at 105).

[7] Cross-petitioner contends (Cross-Pet. 4-14) that States should be entitled to receive preference power without regard

2. Petitioners NYCPUS and VDPS contend that the Commission erred in concluding that neither VDPS nor MDAs qualified as "public bodies." VDPS Pet. 16-28; NYCPUS Pet. 10-14 & nn.11-14. The court of appeals properly rejected that contention, observing that petitioners' arguments on this score "are nothing more than veiled attempts at collaterally attacking the 'public body' criteria." Pet. App. 18. As such, petitioners' arguments have been answered above.

The ALJ and the Commission found that neither VDPS nor the MDAs satisfied any of the three criteria for "public bodies." Pet. App. 44-61, 89-101. That finding was based on express restrictions in the lease agreements with private utilities into which VDPS and MDAs had entered. *Id.* at 54-56, 60-61, 94-95, 100-101. Under those agreements, the private utilities retained exclusive control of the distribution system and remained exclusively responsible for meeting the needs of retail customers. *Ibid.* Moreover, the agreements did not permit retail customers to compare the service provided by the private utilities to service provided by the public entities. *Id.* at 55-56, 60, 95, 101. There was thus ample evidence to support the conclusion that neither VDPS nor the MDAs qualified as "public bodies."

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to whether in using it they provide "yardstick competition." The court of appeals correctly rejected that argument. Pet. App. 21-22. This is not a situation in which congressional attention was focused on the activities of private persons; to the contrary, the statutory text at issue applies to "public bodies." The legislative history of the NRA convincingly shows that Congress intended "public bodies" to provide "yardstick competition." Nothing in the text of the NRA or in the legislative history suggests that Congress intended to except States from this requirement.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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